

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cappell, TX, Employer**

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**Docket No. 08-2547  
Issued: June 12, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 22, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision concerning an overpayment dated August 18, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$1,034.75 for the period May 29, 2008 through June 7, 2008; and (2) whether the Office properly found that appellant was at fault in creating the overpayment.

**FACTUAL HISTORY**

Appellant, a 51-year-old distribution clerk, filed a claim for benefits on July 14, 2005, alleging that she injured her left shoulder and lower back in the performance of duty on June 4, 2005. The Office accepted the claim for sprain/strain of the left shoulder, sprain/strain of the lumbar region and sprain/strain of her left hip/thigh. Appellant returned to work for intermittent periods.

Appellant stopped work on December 3, 2007, when she underwent left rotator cuff repair surgery. The Office commenced her appropriate compensation for temporary total disability.

In the January 15, 2008 letter advising appellant that she would be paid temporary total disability compensation, the Office stated:

“OVERPAYMENTS. To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that you are working.” (Emphasis in the original).

On May 29, 2008 appellant returned to work on light duty.

On June 24, 2008 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$1,034.75 for the period May 29 through June 7, 2008 because appellant received compensation to which she was not entitled. It found that appellant was at fault in the matter because she continued to receive compensation for temporary total disability when she should have been aware, after returning to work on May 29, 2008, that the payments she had been receiving were incorrect. The Office calculated the amount of the overpayment by taking appellant’s net monthly, 28-day compensation payment from May 29 to June 7, 2008, \$2,897.30, dividing it by 28 days, which amounted to \$103.48 and multiplying this figure by 10 days, the period for which she received the overpayment. This created an overpayment of \$1,034.75. The Office advised appellant that, if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. It further advised appellant that when she was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. The Office informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office or request a precoupment hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days of the May 18, 2005 letter. Appellant did not respond to this letter within 30 days.

In a decision dated August 18, 2008, the Office finalized the preliminary determination regarding the overpayment of \$1,034.75.

### **LEGAL PRECEDENT -- ISSUE 1**

Compensation for total disability under the Federal Employees’ Compensation Act is payable when the employee starts to lose pay.<sup>1</sup> Compensation for wage loss due to disability is

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<sup>1</sup> 20 C.F.R. § 10.401(a) (2003).

available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.<sup>2</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,034.75 for the period May 29 through June 7, 2008. The record shows that appellant received an overpayment during the period in question because she continued to receive temporary total disability compensation after she returned to work on May 29, 2008. The Office calculated the \$1,034.75 overpayment by totaling the amount of temporary total disability compensation appellant received during the period May 29 through June 7, 2008, \$1,034.75, in accordance with the procedure outlined above. Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of the Act<sup>3</sup> provides that an overpayment must be recovered unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.<sup>4</sup>

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect....<sup>5</sup>

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<sup>2</sup> *Id.* at § 500(a) (2003).

<sup>3</sup> 5 U.S.C. § 8129(a)-(b).

<sup>4</sup> *Bonnye Mathews*, 45 ECAB 657 (1994).

<sup>5</sup> 20 C.F.R. § 10.433(a).

## **ANALYSIS -- ISSUE 2**

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have expected to know she was not entitled to.<sup>6</sup> Appellant was informed by the Office in its January 15, 2008 letter that she was required to notify it as soon as she returned to work and to return any payment of compensation to the Office in order to avoid an overpayment of compensation. She returned to work on May 29, 2008 but did not return any compensation received after that date, even though she knew or should have known that an overpayment would be created if she accepted compensation benefits after her return to work.

The Board has held however that an employee who receives payments from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into her account, as the acceptance of the resulting overpayment typically lacks the requisite knowledge.<sup>7</sup> After appellant's receipt of the first direct deposit, for which fault may not be imputed to her, it could be presumed that she knew the amount of compensation contained in subsequent direct deposit checks exceeded the amount to which she was entitled. However, the Office became aware that it was erroneously sending compensation checks to appellant immediately after it sent her the first direct deposit check following her return to work. Therefore, for receipt of the first direct deposit, the Board finds that appellant was without fault. While appellant accepted the overpayment by gaining control of the funds deposited into her checking account pursuant to her authorization, she did not know that she would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a paper check and is aware of the amount of the payment before depositing it into her account, appellant was not on notice of the amount of the payment until after it was deposited electronically into her account. As the first direct deposit was the only one containing an erroneously issued compensation payment, appellant is without fault with regard to the overpayment of \$1,034.75 for the period May 29, through June 7, 2008.

## **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,034.75 for the period May 29 through June 7, 2008. The Board finds that appellant was not at fault in creating the overpayment. The case will therefore be remanded to the Office for evaluation of waiver of the overpayment.

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<sup>6</sup> See *Russell E. Wageneck*, 46 ECAB 653 (1995).

<sup>7</sup> That Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months, with clear knowledge that the payments are incorrect. See *Tammy Craven*, 57 ECAB 689 (2006). The Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 18, 2008 decision of the Office of Workers' Compensation Programs be affirmed in part, reversed in part and remanded for a waiver determination.

Issued: June 12, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board